

DECISION



11/97 *Proc I*
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-193754

DATE: August 21, 1979

MATTER OF: Columbus Marble Works, Inc.

DLG 02614

DIGEST:

1. Allegation that several successful bidders are affiliated, contrary to information supplied on their bids, is not for consideration by GAO where contracting officer found bidders responsible, that determination included question presented by protester, and protest does not involve conditions requisite to our review of agency's affirmative determinations of bidders' responsibility.
2. Allegation that several bidders bid collusively with one another and were not unaffiliated bidders as represented in their bids is not sufficient to overcome certification of independent price determination in their bids.
3. GAO will not consider protester's allegations of collusive bidding practices because jurisdiction in such matters is committed exclusively to Attorney General and Federal courts.

AC 000016
Columbus Marble Works, Inc. (Columbus), has protested against the award of indefinite quantity contracts by the Veterans Administration (VA) to Maz Monument Service, Inc. (Maz), and Dercherd Marble and Granite (Dercherd) for granite markers for fiscal year 1979, with a 1-year option, under invitation for bids (IFB) No. 101 (42)-2-79. *DLG 02615*
DLG 02616

The IFB, a total small business set aside, was issued on July 28, 1978, and bid opening was held on August 25, 1978. Contract Nos. V 101(42)-P-52, -P-53, -P-56 and -P-57 were awarded to B&B Marble Company, Maz, Columbus and Dercherd, respectively, on September 29, 1978.

[Protest Involving]

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Columbus initially protested to the VA, as here, against any award to Maz, Dercherd or any other companies under the management and direction of certain named individuals, asserting that the bidders violated the certification of independent price determination required by the IFB. Federal Procurement Regulations (FPR) § 1-1.317 (1964 ed. amend. 159). The VA denied the protest stating that because no evidence of collusion concerning the Dercherd and Maz bid prices was submitted, the contracts were deemed proper.

The protester alleges that the three firms are, affiliated by ownership and management and that their bids in response to the instant IFB were collusively prepared and submitted in contravention of the IFB terms requiring the listing of affiliates and certification of independent price determination and in violation of Federal antitrust statutes. More specifically, Columbus contends that the three firms are represented in their business dealings with the VA by a single managing agent. Evidence of their affiliation and bidding practices has been furnished to the VA since the companies were awarded contracts under the procuring activity's solicitation for fiscal year 1978. The protester concludes that the VA has acted arbitrarily and capriciously in disregarding the collusive nature of the bids, awarding separate contracts to the firms, and failing to terminate the contracts awarded to Maz and Dercherd, citing our decision in B-146647, March 28, 1963.

The certifications and listing in question pertain to the bidders' responsibility. Failure to furnish a statement or affidavit of affiliates or furnishing an inadequate statement is a minor informality which may be waived or cured after bid opening. Weldon Wilson, d/b/a/ Advance Moving and Storage Company, B-190637, April 27, 1978, 78-1 CPD 327; see FPR § 1-2.405 (1964 ed. circ. 1). In making the awards to Maz and Dercherd, the contracting officer made an affirmative determination of the bidders' responsibility, which included consideration of the charge by Columbus regarding affiliation. Dyneteria, Inc., B-186823, October 18, 1976, 76-2 CPD 338. Moreover, our Office does not review affirmative responsibility determinations unless fraud is alleged on the part of the procurement officials or the solicitation contains definitive responsibility criteria which allegedly have not been met. Associated Electronics, Inc.,

B-193859, March 29, 1979, 79-1 CPD 218; United Hatters, Cap and Millinery Workers International Union, 53 Comp. Gen. 931, 932 (1974), 74-1 CPD 310. Because Columbus' protest does not involve either of the conditions requisite to our review of the VA's affirmative determinations of responsibility, we will not consider this ground of the protest on the merits. Clifton Precision Division of Litton Systems, Inc. - Reconsideration, B-190081, June 22, 1978, 78-1 CPD 451.


The purpose of the certification of independent price determination prescribed in FPR § 1-1.317(a) is to assure that the bidders did not collude among themselves to set prices or to restrict competition by inducing others not to bid. Kepner Plastics Fabricators, Inc., et al., B-184451, B-184394, June 1, 1976, 76-1 CPD 351. We have therefore held that even the fact that two bidders may have jointly prepared and submitted two bids does not constitute collusive bidding where there is no evidence of an attempt by these bidders to eliminate competition from other companies. Informatics, Incorporated, B-181642, February 28, 1975, 75-1 CPD 121; Dynamic International, Inc.--Request for Reconsideration, B-183957, December 29, 1975, 75-2 CPD 412. Maz and Dercherd certified that their prices were reached independently and there is no evidence of record which indicates their certifications were violated. Vintage Services, Inc., B-190445, January 11, 1978, 78-1 CPD 25.

It is our position that FPR § 1-1.901 (1964 ed. circ. 1), which governs the reporting of possible anti-trust violations, requires that evidence of collusive bidding in advertised procurements should be referred to the Attorney General by the procuring activity. Kaufman DeDell Printing, Inc., B-190377, November 11, 1977, 77-2 CPD 340. The VA states that the contracting officer considered the possibility of collusion among the bidders and referred the matter to the General Counsel pursuant to Veterans Administration Procurement Regulations § 8-1.901 (1978); FPR § 1-1.317(f) (1964 ed. amend. 107). The VA General Counsel, however, determined that there was not satisfactory evidence to establish collusion between Maz and Dercherd in their bidding under the instant IFB or to submit the case to the Attorney General. Under the circumstances, we cannot conclude that the VA acted in an arbitrary or capricious manner in proceeding with the awards to Maz and Dercherd.

Similarly, we believe that the protester's reliance on our decision in B-146647, March 28, 1963, in support of its contention that the contracts should be terminated is misplaced. The matter cited by Columbus is, in fact, in response to a request for comments on proposed draft provisions for the FPR, which now constitute FPR § 1-1.317. There we suggested that further consideration might be given to providing a remedy, such as a contract termination, in the event that an award was made on a collusive bid and the collusion was not discovered until after performance began. That suggestion, however, has never been implemented.

Finally, it is not within our jurisdiction to determine what constitutes a violation of a criminal statute, but within the jurisdiction of the Attorney General and the Federal Courts. In this regard, we note that the protester may also ask the Attorney General to review such allegations. Industrial Design Laboratories, Inc., B-190031, May 19, 1978, 78-1 CPD 385; Clifton Precision Division of Litton Systems, Inc., B-190081, May 9, 1978, 78-1 CPD 348.

The protest is denied.


Deputy Comptroller General
of the United States